

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

-----X
IN RE: : Case No. 1:17-md-2804
:
NATIONAL PRESCRIPTION :
OPIATE LITIGATION :
:
CASE TRACK THREE : **VOLUME 29**
:
:
:
:
:
:
:
:
:
:
November 16, 2021
-----X

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HELD BEFORE THE HONORABLE DAN AARON POLSTER

SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter: Heather K. Newman, RMR, CRR
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
216.357.7035

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 APPEARANCES:

2 For the Plaintiffs:

Peter H. Weinberger, Esq.
SPANGENBERG, SHIBLEY & LIBER
1001 Lakeside Avenue, Ste. 1700
1900 East Ninth Street
Cleveland, Ohio 44114
216-696-3232

W. Mark Lanier, Esq.
Rachel Lanier, Esq.
THE LANIER LAW FIRM
6810 FM 1960 West
Houston, Texas 77069
813-659-5200

Frank L. Gallucci, III, Esq.
PLEVIN & GALLUCCI COMPANY, LPA
The Illuminating Building
Suite 2222
55 Public Square
Cleveland, Ohio 44113
216-861-0804

14 For Walgreen Defendants:

Kaspar J. Stoffelmayr, Esq.
Brian C. Swanson, Esq.
Katherine M. Swift, Esq.
BARTLIT BECK LLP
54 West Hubbard Street, Ste.300
Chicago, Illinois 60654
312-494-4400

1 APPEARANCES (Cont'd):

2 For CVS Defendants:

Eric R. Delinsky, Esq.
Paul B. Hynes, Jr., Esq.
Alexandra W. Miller, Esq.
ZUCKERMAN SPAEDER - WASHINGTON
Suite 1000
1800 M Street, NW
Washington, DC 20036
202-778-1831

6

7 For Walmart
Defendants:

John M. Majoras, Esq.
JONES DAY - COLUMBUS
Suite 600
325 John H. McConnell Blvd.
Columbus, Ohio 43215
614-281-3835

8

9

10

Tara A. Fumerton, Esq.
JONES DAY - CHICAGO
Suite 3500
77 West Wacker
Chicago, Illinois 60601
312-782-3939

11

12

13

14 ALSO PRESENT:

David Cohen, Special Master

15

16

17

18

19

20

21

22

23

24

25

- - - - -

1 (In court at 3:44 p.m.)

2 THE COURT: All right. Please be seated.

3 A short time ago we received a question signed by the
4 foreperson, "Can we please have the DEA definition of
15:44:38 5 diversion?"

6 My intent is to simply say I cannot answer this
7 question; you must rely on your collective memories of the
8 testimony and, of course, review the documents. Unless
9 anyone has better suggestions.

15:45:08 10 Certainly there's no definition of diversion in the
11 instructions. I looked. If there was, I would refer them
12 to that instruction. There's not. There's certainly no
13 reference to what -- what, if any, the DEA definition of
14 diversion is.

15:45:24 15 I don't know if there's a specific document that said
16 that. If there is and the parties agree, I can refer the
17 witnesses [sic] to that specific document. But if there's
18 not, then I will just say I cannot answer this question and
19 you are to rely on your collective memory of the testimony
15:45:46 20 and the documents.

21 MR. LANIER: Your Honor, Mark Lanier for
22 plaintiffs.

23 Your Honor, Mark Lanier for plaintiffs.

24 I agree, you don't have it in the instructions. I
15:46:31 25 don't believe that it's in any documents. I do believe that

1 there was witness testimony to it. I'm not sure whether the
2 parties would agree to have the testimony either read back
3 or typed up, or if that's even appropriate in the
4 Sixth Circuit, but I think that if anywhere, it might be in
15:46:51 5 a Joe Rannazzisi PowerPoint, but I don't recall that it is,
6 but I think it may be in either Demetra Ashley's testimony
7 or in Joe Rannazzisi's testimony.

8 THE COURT: All right. Well, Mark, I
9 typically don't read back on my own sections of the
15:47:09 10 testimony. If the jury says, may we read back, or may we
11 read -- have a section, I don't have a problem doing that,
12 but I don't -- I don't sort of volunteer sections for them.
13 I've never done that, and I don't think -- I don't think
14 that's appropriate.

15:47:27 15 MR. LANIER: I agree.

16 MR. DELINSKY: Your Honor --

17 MR. STOFFELMAYR: Kaspar --

18 MR. DELINSKY: Your Honor, could we just have
19 30 seconds among the defense to huddle on this one?

15:47:39 20 THE COURT: Absolutely.

21 MR. DELINSKY: Thank you, Your Honor.

22 (Counsel conferring)

23 MR. STOFFELMAYR: Judge, Kaspar Stoffelmayr.

24 We've conferred briefly. We agree with what you
15:48:27 25 suggested. I don't think there is such a thing as an

1 official definition by DEA in any event.

2 THE COURT: Okay.

3 MR. DELINSKY: Your Honor, we just note we
4 proposed an instruction, a definition of diversion among the
15:48:40 5 defendants. It's -- but Mr. Stoffelmayr is exactly right,
6 it doesn't purport to be the DEA definition.

7 THE COURT: Okay. All right. Thanks.

8 Mr. Pitts, if you'd bring in the jurors, please.

9 (Brief pause in proceedings)

15:51:34 10 (Jury returned to courtroom at 3:48 p.m.)

11 THE COURT: Okay. Please be seated, ladies
12 and gentlemen.

13 A short time ago I received a question signed by your
14 foreperson that reads as follows:

15:51:43 15 "Can we please have the DEA definition of diversion?"

16 I've conferred with counsel. The Court cannot answer
17 this question. You must rely upon your collective memory of
18 the testimony and the documents.

19 Thank you.

15:52:07 20 (Jury excused from courtroom at 3:52 p.m.)

21 THE COURT: Okay. Everyone can be seated for
22 a second.

23 Just close the back doors, please.

24 All right. It's possible we may get other questions
15:53:02 25 like that, but that's really the only way to answer a

1 question like that.

2 I have no idea what the end result will be, but
3 obviously if there would be a plaintiffs' verdict against
4 any of the three defendants, I'll need to schedule a bench
15:53:22 5 proceeding on remedy. And I don't know if you've talked
6 about what needs to be done before then and roughly how long
7 such a proceeding would take. I've never done one. So I
8 have no clue from my past experience in terms of length.
9 But in terms of what needs to be done in terms of discovery,
15:53:47 10 I thought I would find out and so I could get some idea for
11 my scheduling.

12 Have you discussed what would need to be done and
13 roughly how long a proceeding would -- it would take?

14 MR. WEINBERGER: Peter Weinberger on behalf of
15:54:07 15 plaintiffs.

16 We have not discussed it with defense counsel. Under
17 the case management order as subsequently modified, we
18 produced our expert reports for the second phase. The
19 original CMO called for depositions of those experts and
15:54:31 20 then production of the defendants' expert reports, but we
21 modified that to just have us produce -- actually we had
22 already produced our expert reports.

23 THE COURT: Did you produce them, Peter?

24 MR. WEINBERGER: We have produced them. Yes.
15:54:46 25 We have produced expert reports.

1 THE COURT: How many did you produce,
2 ballpark?

3 MR. WEINBERGER: Ballpark, I think four.

4 MR. LANIER: Five.

15:54:55 5 MR. WEINBERGER: Yeah, four or five.

6 THE COURT: Okay. All right. Four or five.

7 MR. WEINBERGER: And so they would need to be
8 deposed, and then if -- the defendants' expert reports would
9 need to be produced, they would need to be deposed. And
10 then I think we would be in a position to try the second
11 phase.

12 I'll just give you my ballpark in terms of length. I
13 would say probably seven to ten trial days.

14 MR. LANIER: Yeah. My estimate, Your Honor,
15 was ten trial days. Obviously, we don't have to pick a
16 jury. You can do summations or -- in writing or not, but
17 seven to ten trial days should be -- allows you to put it
18 on. It will be so much more streamlined when we're trying
19 it to you versus a jury and so we'll be able to go very
15:55:47 20 quickly.

21 THE COURT: Okay. So there would be -- all
22 right. Deposing the plaintiffs' experts. Then the
23 defendants' producing experts. Your deposing them.

24 Would there be a lot of fact witnesses or primarily it
15:56:05 25 would be these experts, Peter and Mark?

1 MR. LANIER: Your Honor, the way -- if I'm
2 honored to get to try it with Pete and Frank, the way I
3 would do it is I would probably put on a couple of fact
4 witnesses, but it wouldn't be very detailed. I mean, it
15:56:19 5 would be detailed, but it wouldn't be very lengthy. So I
6 would envision probably two to three fact witnesses per
7 county, but most of it we'll do with expert testimony
8 because the experts can rely upon the fact witnesses and the
9 experts have the cumulative knowledge and the numerical
15:56:36 10 knowledge. So that's why I'm figuring ten trial days on the
11 outside. I think we do it in two weeks, especially the way
12 you work.

13 THE COURT: Well, I mean -- we're doing it,
14 this is what I'm focusing on, obviously.

15:56:51 15 All right. From the defense standpoint -- obviously
16 you agree on what needs to be done -- does the seven to
17 ten days sound about right to -- right to you?

18 MR. STOFFELMAYR: I can only speak, you know,
19 for myself. We haven't discussed it as a group, but I was
15:57:11 20 going to say one to two weeks, so that's about the same.

21 THE COURT: Okay. All right.

22 In terms of the production of the defendants' experts,
23 ballpark, how long would this take? Would you wait until
24 after you deposed the plaintiffs' experts?

15:57:40 25 MR. STOFFELMAYR: That's right, Your Honor.

1 That was the system under the original CMO. There was --
2 one of the plaintiffs' experts had a health condition was
3 the only reason this all got pushed back.

4 THE COURT: How is he or she now?

15:57:50 5 MR. WEINBERGER: Well, the one expert who had
6 some medical problems was Dr. Harvey Rosen, who is our
7 economist, and he's recovered.

8 THE COURT: That's good. Okay.

9 MR. WEINBERGER: So...

15:58:02 10 THE COURT: Good.

11 Okay. So this process would likely take a few months
12 if I'm -- sounds like.

13 Mr. Majoras is nodding. Does that sound --

14 MR. MAJORAS: I think that's right,
15:58:19 15 Your Honor.

16 THE COURT: Okay. And I'll block out
17 two weeks. Okay.

18 All right. Fine. Then I'm going to sort of take a
19 look at my schedule and see where I've got basically two
15:58:44 20 uninterrupted weeks, absent emergency, that's what I
21 would -- I would do the same as if it were a Jury Trial. I
22 just block it out and squeeze in anything else. I need my
23 criminal matters in the noon hour. Okay.

24 MR. MAJORAS: Your Honor, I think from a
15:58:57 25 timing standpoint, three months, just given the holidays

1 included, three months or more is going to be --

2 THE COURT: Yeah. I -- not much is happening
3 in December. So we got February, March. So... so it's not
4 likely to be before April. I mean, I'll start taking a look
15:59:20 5 in, you know, April and May and see where I've got two clear
6 weeks and come up with some suggestions in the near future.

7 I'll try and avoid Passover and Easter. Take a look
8 when -- well, Passover is earlier, but I'll have to check.

9 Okay. All right. I --

15:59:56 10 MR. DELINSKY: Your Honor, if I can --

11 THE COURT: Yes.

12 MR. DELINSKY: -- on the scheduling, and I'm a
13 highly superstitious person, so I hate this conversation --

14 THE COURT: You're highly superstitious.

16:00:06 15 MR. DELINSKY: I am so superstitious, so I am
16 not --

17 THE COURT: What day or days in April and May
18 should be avoided? I don't want to --

19 MR. DELINSKY: Well, I was just going to say,
16:00:17 20 I have twin high schoolers graduating in early May, so --

21 THE COURT: All right. What week? We'll try
22 and avoid that.

23 MR. DELINSKY: Because I'm not looking all
24 that forward to them leaving home, I don't -- I've been
16:00:29 25 avoiding that, but I think it's the first two weeks of May.

1 THE COURT: All right.

2 MR. DELINSKY: And I'm crossing my fingers,
3 Your Honor. I'm really sick to my stomach having any
4 conversation about this whole subject.

16:00:42 5 THE COURT: You mean graduating?

6 MR. DELINSKY: Well, yes, that.

7 THE COURT: I mean, I hope they're planning --
8 I hope they're planning to graduate, Eric.

9 MR. DELINSKY: It's the verdict. It's the
16:00:54 10 verdict.

11 I think they'll make it through graduation. Although,
12 you never know.

13 THE COURT: I hope so. And the key is beyond.
14 All right? I mean, you know.

16:01:06 15 Look, I hope they're able to have in-person
16 ceremonies. I mean, the past couple years I felt very badly
17 for all those men and women. They -- you know, a lot of
18 them didn't have high school graduations. They had little
19 or, you know, not much in the way of college graduation and
16:01:21 20 you can say, well, it's no big deal, but it is a big deal to
21 them at the time. It's the only one -- you can't sort of
22 make it up afterwards.

23 MR. DELINSKY: Yeah.

24 THE COURT: So...

16:01:31 25 MR. DELINSKY: Yeah. And, Judge, and

1 actually, the more I think about it, I don't know the dates,
2 so I'll let David know the exact dates. It's the one -- my
3 one protected time.

4 THE COURT: All right. I'll --

16:01:43 5 MR. DELINSKY: And my fingers are still
6 crossed, just so that's clear on the record.

7 THE COURT: Okay.

8 All right. Well, we'll see. My guess is the jury
9 will, if they're -- don't have a verdict, around normal
16:01:57 10 quitting time, they'll want to quit then and this time I'll
11 make sure I bring them all in so I can give them the
12 admonition.

13 Okay. Thanks.

14 MR. LANIER: Thank you, Judge.

16:02:07 15 MR. DELINSKY: Thank you.

16 (Recess was taken at 4:02 p.m.)

17 (Jury returned to courtroom at 4:46 p.m.)

18 THE COURT: Okay. Please be seated.

19 All right. Good evening, ladies and gentlemen. I
16:47:16 20 understand you'd like to break for the evening.

21 THE JURY: Yes.

22 THE COURT: All right. That's fine.

23 Usual admonitions apply.

24 Do not read, listen, view, encounter anything
16:47:29 25 whatsoever about this case in the media or anything related

1 in any way to the subject matter of the trial.

2 Do not discuss this case with anyone. If any of your
3 family members or friends ask you, you say you are on the
4 jury, this mean judge has ordered me not to talk about it
16:47:46 5 until the case is over and that's that.

6 Have a good evening.

7 What time do you want to resume tomorrow morning, just
8 so we --

9 THE JURY: 9:00.

16:47:56 10 THE COURT: Okay. 9:00.

11 Have a good evening. Travel safely. And again, the
12 only instruction tomorrow, please wait until all 12 of you
13 are there to start deliberating.

14 Okay. Have a good evening.

16:48:07 15 (Jury excused from courtroom at 4:48 p.m.)

16 THE COURT: Okay. Have a good evening,
17 everyone.

18 MR. STOFFELMAYR: Thank you, Judge.

19 MR. MAJORAS: Thank you, Judge.

16:48:48 20 (Proceedings adjourned at 4:48 p.m.)

21

22 **C E R T I F I C A T E**

23 I certify that the foregoing is a correct transcript
24 of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

25 /s/ Heather K. Newman 11-16-2021
HEATHER K. NEWMAN, RMR, CRR DATE